Grand Valley State University
Harassment and Discrimination: How to Conduct Effective Investigations in Higher Education

Presented by:
Tracy Maginn
Barnes & Thornburg LLP
November 18, 2021
Why Investigate?

• Legal Reasons
  – Title IX of the Educational Amendments of 1972 to the Civil Rights Act of 1964:
    • Requires colleges and universities to investigate allegations of sex discrimination, sexual harassment and assault, domestic violence, and stalking.
  – Title VII of the Civil Rights Act of 1964 and other similar laws prohibiting discrimination:
    • Taking steps to investigate and promptly correct harassment may be a defense to discrimination and harassment claims.
Why Investigate?

• Practical Reasons
  – Protects employees and students
  – Protects the Institution.
    • Complies with the law.
    • Information collected allows the Institution to take appropriate action.
  – Enhances employee relations
    • Turnover.
    • Morale.
    • Motivation and Productivity.
  – Deters future misconduct.
Title IX

The image shows a group of protesters holding signs. One sign reads, "TITLE IX, DO YOUR JOB." Another sign says, "PRINCETON - TAKE ACTION to Protect Your STUDENTS, NOT Your REPUTATION." The protesters are marching and shouting for action on Title IX issues.
Title IX

• Title IX has very specific requirements regarding when, how, and why an institution should conduct an investigation.

• These specific requirements mean institutions have limits on when they can begin an investigation under Title IX.
Title IX – Why Investigate?

Receipt of allegations of conduct that constitutes, or may constitute, sexual harassment as defined by Title IX.
Title IX – When Can the Institution Investigate?

Upon the filing of a formal complaint.
Title IX – How Should Institution Respond?

• Investigation.

• Hearing which is “tried” by a decision-maker who is not the same person as the investigator.

• Parties may have advisors during the investigation and must be represented by an advisor at the hearing.

• Must allow appeal.
Non-Title IX Claims

• Institutions have much more flexibility regarding when, how, and why they investigate other harassment and discrimination claims.
  — When: Have knowledge of behavior that may be harassing or discriminatory. No formal complaint is required.
  — Why: Investigate claims based on all protected characteristics, not just sex.
  — How: Way that is effective to eliminate and address discrimination and harassment.
What is Title IX?

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”
Title IX – Sexual Harassment Defined

• Quid Pro Quo Harassment;
• Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or
• Sexual assault, dating violence, domestic violence, or stalking.
Title IX – Scope of Coverage

Covers sexual harassment occurring "in the school’s education program or activity, against a person in the United States."
Title IX – Scope of Coverage

– Buildings or other locations that are part of the school’s operations (including remote learning platforms).

– Off-campus settings where school exercises substantial control over the respondent and the context in which the alleged harassment occurred.

– Off-campus buildings owned or controlled by a student organization officially recognized by the institution.

– In the United States.
Title IX – Scope of Coverage

• Includes sexual harassment by or against students **and** employees.
• Covers:
  – Student on student conduct.
  – Student on employee conduct.
  – Employee on student conduct.
  – Employee on employee conduct.
Title IX – Who Can Report?

• Anyone can report sexual harassment.
  – Reporter can be the alleged victim.
  – Reporter can be someone else.
Title IX – How to Report

• Reports can be made:
  – In person.
  – By mail.
  – By telephone.
  – By e-mail.
  – To the Title IX Coordinator.
  – By any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.

• Reports can be made at any time (including during non-business hours).
Title IX – When Does an Institution Have an Obligation to Respond?

An Institution must respond when it has actual knowledge (i.e., notice) of sexual harassment or allegations of sexual harassment.
Title IX – Who Can Have Actual Knowledge?

• Title IX Coordinator.
• A designated school official with authority to institute corrective measures on the school’s behalf. For instance,
  – President.
  – Vice Presidents.
  – Human Resources Director.
  – Academic Deans.
  – Associate Academic Deans.
  – Campus Police.
  – Athletic Director.

• Note: School does not have actual knowledge just because a mandatory reporter has knowledge.
Title IX – When Must an Institution Investigate?

• Upon receipt of a **formal complaint**:
  
  – A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation.
  
  – A complainant’s wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.
Title IX – Investigation Requirements

• Investigate allegations in a formal complaint.
• Send written notice to both parties of the allegations in the formal complaint.
• Schools may not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no “gag orders”).
• Allow parties opportunity to select an advisor of their choice (may be an attorney).
Title IX – Investigation Requirements

• Send written notice of any investigative interviews, meetings, or hearings (surprise interviews are barred).

• Send the parties, and their advisors, evidence directly related to the allegations with at least 10 days for the parties to inspect, review, and respond to the evidence.

• Send the parties, and their advisors, an investigative report summarizing relevant evidence with at least 10 days for the parties to respond.

• **Important:** The Investigator and the Decision-maker may not be the same person.
Reasons Not to Investigate Under Title IX

• An institution may only investigate for oral written complaints.
• The conduct alleged must meet Title IX’s definition of sexual harassment for the investigation to occur.
• The alleged harassment must have occurred in the school’s education program or activity against a person in the United States.
Reasons Not to Investigate Under Title IX

If Title IX does not apply, the Institution may still investigate the complaint under another process if appropriate.
GVSU Grievance Processes

• GVSU has three processes for responding to reports of harassment, discrimination, retaliation and sexual misconduct.

• Processes are explained in GVSU’s Procedures for Responding to Reports of Harassment, Discrimination, Retaliation, & Sexual Misconduct (including Sexual Assault, Intimate Partner Violence, Stalking, & Sexual Exploitation)

• Policy & Procedures - Office for Title IX and Institutional Equity (TIXIE) - Grand Valley State University (gvsu.edu)
Process A – Title IX

Process A is used when complaint falls within parameters of Title IX, as discussed.
Process B – Sexual Misconduct

Process B is used when Process A does not apply or Title IX complaint has been dismissed by Title IX Coordinator.
Process C – Harassment and Discrimination

Process C is used to address claims of harassment and discrimination that do not fall under Process A or B.
How to Conduct an Investigation
When to Investigate

- Formal sexual harassment complaint signed by Complainant or Title IX Coordinator.
- Where allegations do not fall under Title IX but violate some other policy.
When to Investigate (non-Title IX)

- Formal complaints.
- Anonymous complaints.
- Reports to supervisor, management, or other Institutional personnel.
- EEOC or agency charge.
- Having knowledge of harassing, discriminatory, threatening or other inappropriate behavior.
Planning the Fact Finding

• What is the question you are trying to answer?
  – Review policy.
  – This will help you identify what questions you need to get answered.
  – Will also help you map out your investigation plan.
Investigation Plan

• Consider location, notification, and order of interviews.
  – Decide whether to bring someone with you to the interviews (almost always yes).
  – Where to do the interview.
  – Order of interviews (subject to witness availability).

• Identify whether interim actions are necessary.
Interview Basics
Interview Basics

• Typical strategy for witness interviews:
  – Put the witness at ease.
  – Explain the procedure and situation.
  – Let the witness give a narrative.
  – Ask questions based on the narrative and questions that may be outside the narrative.
Putting the Witness at Ease

• Private location.
• Comfortable.
• Avoid displays of power.
  – “Scary” office.
  – Sitting across desk.
  – High chair, etc.
• Have a note-taker so the interviewer can just have a conversation.
Explain the Procedure

- Set the tone for the interview.
- Review the policy as necessary.
  - Be clear about confidentiality.
    - Title IX: no gag orders.
    - Other: Can require confidentiality.
  - Explain what steps have been taken.
  - Remind them of anti-retaliation provisions.
Questioning

- The goal is an open ended conversation.
- The narrative – just let the witness talk.
- Fill in the gaps and get specifics.
- Questions outside the narrative are particularly helpful for third party witnesses.
- Be non-judgmental.
- Get more information than you give.
- Listen carefully for witnesses and tangible evidence that would be helpful.
Follow Up

• Consider interviewing the Complainant again.
• Purpose of follow-up interviews is to get clarification on key facts.
Collect Evidence

- Photographs.
- Police records.
- Social media.
- Text messages.
- Phone records.
- Other tangible evidence.
- Personnel files.
Beware of Spoliation

• Automatic email deletions.
• Cell phone text records.
• Video overwrite.
• Preserve, preserve, preserve!!!!
Making Credibility Determinations

• Watch for witnesses changing their story—particularly after witnesses may have talked with each other.
• Is the witness’ story consistent with tangible evidence?
• Does it make sense?
• A Respondent’s statements are not inherently less valid than a Complainant’s and vice versa.
Prepare the Written Report

• Title IX

  – Must give Complainant and Respondent chance to review evidence and 10 days to respond before preparing the report.
Prepare the Written Report

- Must give Complainant and Respondent chance to review report and 10 days to respond.
- Do not make a decision

• Other investigations
  - Depends on your policies.
  - Investigator and decision-maker can be the same person.
Preparing the Written Report

• It’s important to connect ALL of the dots to paint a complete picture that fully supports any conclusions.

• Keep an eye out for gaps or missing connections to produce the strongest investigative report possible.
Preparing the Written Report

• **Remember:**
  - Question is whether a policy has been violated.
  - Outline the procedural steps that were followed.
  - Paint the complete picture with relevant, unbiased evidence.
  - Write from a point of neutrality.
    – Avoid implications of bias or conflicts.
Desired Outcome - Complainant

• I was heard.
• I was told and understood what to expect during the course of the investigation.
• I was not openly doubted or debated.
• I was not interrupted.
• I know something happened in response to my complaint.
• I was taken seriously.
• I was treated fairly.
Desired Outcome – Respondent

• I was informed of the complaint.
• I had an opportunity to respond.
• I was told no conclusions would be drawn until fact finding complete.
• I was not treated as if I was guilty until proven innocent.
• I was taken seriously.
• I was treated fairly.
• I knew what to expect during the course of the investigation.